IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7447 OF 2006

Omen Kuruvilla s/o Peter Kuruvilla ...Petitioner

Versus

George Kuruvilla s/o Koshy Kuruvilla ...Respondent

Shri M.M.Sathaye for the Petitioner.

Shri M.S.Karnik for the Respondent.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 09, 2007.

P.C.:

1. Rule. The Respondent waives service. Taken up for hearing forthwith. The Petitioner is the original Plaintiff. By this Writ Petition under Article 227 of the Constitution of India, the Petitioner has taken exception to order dated 18th September, 2006 passed by the trial Court by which a preliminary issue as regards bar of limitation has been framed.

2. The submission of the learned Advocate for the Petitioner is that in view of a recent judgment of the learned single Judge of this Court, section 9A of the Code of Civil Procedure, 1908 could not have been invoked by the Respondent-Plaintiff. Relying upon decision of Apex Court in the case of Ramesh B. Desai

and Ors. Vs. Bipin Vadilal Mehta and Ors (2006(5) Supreme Court Cases Page 638) he submitted that the issue of limitation being a mixed question of law and fact could not have been tried as a preliminary issue.

3. I have heard the learned Advocate for the Respondent who has supported the impugned judgment and order. The impugned order discloses that the same has been passed in exercise of powers under section 9A of the Code of Civil Procedure, 1908. The view taken by this Court in the case of **Solapur Social Urban Co-operative Bank Ltd Vs. Sou Nigam A.Manna Beskar and Ors reported in 2006(4) Bombay Cases Reporter Page 217** is that in view of the Code of Civil Procedure (Amendment) Act, 1999 as well as the Code of Civil Procedure (Amendment) Act, 2002 section 9A stands repealed with effect from 01st July, 2002. Though correctness of the said view is being examined by a Division Bench of this Court, as of today, the decision of the learned single Judge holds the field. As the impugned order has been passed in exercise of power under section 9A of the said Code, the same deserves to be quashed and set aside. However, issue of limitation will have to be kept open to be considered at an

appropriate stage.

4. Hence, I pass the following order:

(i) The impugned Judgment and Order dated 18th September, 2006 is quashed and set aside and the Application made by the Respondent at Exhibit 19 stands dismissed.

(ii) It is made clear that issue as regards bar of limitation is expressly kept open which will be considered by the trial Court at an appropriate stage.

(iii) Petition is partly allowed in above terms.

(iv) No orders as to costs.

JUDGE